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No. 81-1843

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

JOHN ANDREAS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The warrantless opening by police of John Andreas' sealed container, and the warrantless cracking open of the solid wood table top within, were violations of his Fourth Amendment rights and rendered the contents inadmissible at trial, where the police had seized the sealed container, taken it to a protected location, and there were no exigent circumstances.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
JURISDICTION	1
STATEMENT OF CASE	2
REASONS FOR DENYING THE WRIT:	
The Illinois Appellate Court Correctly Applied Both State And Federal Law As To Warrantless Searches And Seizures After Rejecting The Factual Contention That There Has Been A "Controlled Delivery"	3
CONCLUSION	6

AUTHORITIES CITED

Cases

Arkansas v. Sanders, 442 U.S. 753 (1979)	3
People v. Hamilton, 74 Ill. 2d 457 (1979)	3
People v. Redmond, 73 Ill. App. 3d 160 (1979)	3
People v. Vogel, 58 Ill. App. 3d 910 (1973)	3
People v. VonHatten, 52 Ill. App. 3d 338 (1977)	3
Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976)	5
Tacon v. Arizona, 410 U.S. 351 (1973)	4
United States v. Chadwick, 433 U.S. 1 (1977)	3
United States v. General Dynamics Corporation, 415 U.S. 486 (1974)	5

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The Respondent, JOHN ANDREAS, respectfully prays that the Petition for a Writ of Certiorari to review the judgment and opinion of the Illinois Appellate Court, First Judicial District, entered on September 15, 1981, be denied.

JURISDICTION

Petitioner adequately sets forth the jurisdiction of this Court.

STATEMENT OF THE CASE

On February 22, 1979, police officers seized a closed, sealed container from John Andreas. (Tr. 17) John Andreas was arrested in the building hallway outside the door of his apartment. (Tr. 17) The container was seized at that same location at that time. (Tr. 17) The container was taken in its closed, sealed condition to police headquarters. It was later opened by police outside the presence of John Andreas. (Tr. 36) The container had two locks affixed to hinges. (Tr. 42) It was not possible to see into the container when it was closed. (Tr. 35) The police had no warrant for the search of the container. (Tr. 36)

Evidence was introduced that customs agents had searched a container on February 21, 1979, at O'Hare Airport. (Tr. 41-42) Contraband was discovered in that package. (Tr. 43) Police agents Labek and Lipsek delivered a sealed container of the same description to the apartment of John Andreas on February 22, 1979. Neither officer had been present when that package had been sealed at the airport. They left the container with John Andreas in the hallway in front of his apartment door. (Tr. 16) Officer Labek saw John Andreas pull the container into his apartment. They then left the vicinity of the hallway. (Tr. 22) John Andreas was arrested in that hallway some 30 to 45 minutes later. (Tr. 16-17) It was at that time that the seizure of the container occurred. The apartment was not under surveillance during the 30 to 45 minute period. (Tr. 22, 38) It was after this seizure that the container was transported to the police and eventually opened. Contraband was allegedly discovered. (Tr. 37)

Contrary to representations in the petitioner's statement of the case, the State did not prove that Inspector Drozek arranged for a "controlled delivery" of the container. The Illinois Appellate Court specifically found that no "controlled delivery" had taken place.

Contrary to representations in the petitioner's statement of the case, Agent Labek did not maintain surveillance on respondent's apartment. The Illinois Appellate Court specifically found that neither defendant nor his apartment was kept under continuous or close surveillance.

REASONS FOR DENYING THE WRIT

THE ILLINOIS APPELLATE COURT CORRECTLY APPLIED BOTH STATE AND FEDERAL LAW AS TO WARRANTLESS SEARCHES AND SEIZURES AFTER REJECTING THE FACTUAL CONTENTION THAT THERE HAD BEEN A "CONTROLLED DELIVERY."

The Illinois Appellate Court ruled that the law controlling the warrantless search in this case is expressed in the cases of *United States v. Chadwick*, (1977) 433 U.S. 1, 53 L. Ed. 2d 538, 97 S. Ct. 2476, and *Arkansas v. Sanders*, (1979) 442 U.S. 753, 61 L. Ed. 2d 235, 99 S. Ct. 2586, as well as a number of Illinois opinions: *People v. Hamilton*, (1979) 74 Ill. 2d 457, 386 N.E. 2d 53; *People v. Redmond*, (1979) 73 Ill. App. 3d 160, 390 N.E. 2d 1364; *People v. Vogel*, (1973) 58 Ill. App. 3d 910, 374 N.E. 2d 1152; *People v. VonHatton*, (1977) 52 Ill. App. 3d 338, 367 N.E. 2d 566.

The prosecution contended in the Appellate Court that the warrantless search of the container was justified

because the container had already been searched a day or two earlier by a customs agent at O'Hare Airport. For purposes of argument, the parties and the Court assumed that the earlier customs search was proper. The prosecution contended that the police made a so-called "controlled delivery" of the container. The Appellate Court entertained this contention and specifically ruled that the facts did not support the contention that a "controlled delivery" occurred.

> "Instead of retaining dominion and control of the package as in the 'controlled delivery' cases, the authorities here relinquished such control." (Appellate Court Opinion; see Petitioner's Appendix, page 8a).

Thus the issue decided by the Illinois Court was a factual issue, not a legal issue. The petitioner here begs the question and misleads this Court by redeciding this factual question contrary to the conclusion of the Illinois Court. The incorrect factual starting point has caused the petitioner to erroneously frame the legal issue presented to this Court. Contrary to petitioner's contention, the Illinois Appellate Court has not rejected the reasoning and holdings of the Seventh and Tenth Circuit Courts. (Petition, page 4). In fact, the Court considered each of the cited cases in detail and found them inapposite, since there had been no "controlled delivery." (Appellate Court Opinion, Petitioner's Appendix, pages 6a and 7a)

This Court has stated that issues which are primarily factual do not, by themselves, normally justify the exercise of certiorari jurisdiction. *Tacon v. Arizona*, (1973) 410 U.S. 351, 35 L. Ed. 2d 346, 93 S. Ct. 998. Where factual issues have been raised this Court has normally applied a standard of "not clearly erroneous" to a lower

court's findings. *Roemer v. Maryland Public Works Board*, (1976) 426 U.S. 736, 49 L. Ed. 2d 179, 96 S. Ct. 2337; *United States v. General Dynamics Corporation*, (1974) 415 U.S. 486, 39 L. Ed. 2d 530, 94 S. Ct. 1186.

The facts presented in the trial court clearly supported the finding that police authorities had relinquished control of the container after the original customs search. Officer Kenneth Labek said that after the container was delivered, Mr. Andreas pulled it into the apartment out of Labek's view. He did not see any container after that for at least a half hour. Labek was asked:

> "Q. So that you did not have the Andreas apartment under personal surveillance during that 30 to 45 minutes yourself?
> A. That's correct." (Tr. 22)

Labek said the other officer left the building. (Tr. 23) Officer Lipsek confirmed this:

> "Q. Now after you delivered the metal container, did you have occasion to leave the location?
> A. Yes, I did." (Tr. 38)

The issue properly decided by the lower courts was a factual one. Based on the evidence presented, it cannot be said that the Illinois Appellate Court was clearly erroneous in upholding the trial judge's determination that no controlled delivery occurred. The petition for certiorari in this case should be denied.

CONCLUSION

It is respectfully submitted that the petitioner has failed to demonstrate special and important reasons for issuance of a writ to a state court of appeals. The decision of the Illinois Court of Appeals correctly applies both Federal and Illinois law wholly consistent with previous decisions of this Court. For the above reasons respondent respectfully submits that the Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

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